

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EVERARDO CARRIZALES

Claimant

VS.

WINSTEADS AND WAIDS COMPANY

Respondent,
Self-Insured

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Docket No. 251,072

ORDER

Claimant appealed the March 7, 2003 Preliminary Decision¹ entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on August 15, 2003.

APPEARANCES

C. Albert Herdoiza of Kansas City, Kansas, appeared for claimant. Mark E. Kolich of Lenexa, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered in this request for interest includes the transcript from a February 20, 2003 hearing before Judge Foerschler and the Division of Workers Compensation's administrative file.

ISSUES

This is a request for a pre-award interest penalty under K.S.A. 44-512b.

This claim was tried and decided by the Judge in a June 29, 2001 Award. Respondent appealed the Award to this Board, which entered its decision on December

¹ Although the Judge labeled his order as a Preliminary Decision, penalty orders are final orders for purposes of appeals to this Board. Moreover, the Judge issued an award in this claim in June 2001. Accordingly, this is a post-award proceeding in which the entire Board participated in and decided.

16, 2002. The primary issue before both the Judge and this Board in the earlier appeal was the nature and extent of claimant's injury and impairment.

Claimant now contends he is entitled to receive pre-award interest on the minimum amount of permanent partial disability compensation that the Judge could have found. Claimant argues that before the Judge decided the June 29, 2001 Award, respondent should have paid claimant benefits for a four percent permanent partial general disability. Claimant requests interest for a four percent permanent partial general disability commencing March 14, 2000, when respondent's medical expert witness, Dr. Edward J. Prostic, issued a report in which the doctor assessed claimant's whole body functional impairment at four percent. Claimant also requests interest commencing December 5, 2000, for a five percent permanent partial general disability as on that date Dr. Prostic testified claimant had sustained a five percent whole body functional impairment due to the work-related injury in question.

In the March 7, 2003 Preliminary Decision, Judge Foerschler denied claimant's request for pre-award interest. Claimant initiated this appeal and requests the Board to reverse the Judge's decision and to order respondent to pay an interest penalty.

Conversely, respondent contends the March 7, 2003 Preliminary Decision should be affirmed. Respondent argues that an interest penalty is not appropriate as (1) nature and extent of injury and disability were issues to be decided by the Judge, (2) claimant failed to raise the interest penalty issue at regular hearing when the parties narrowed the issues to be decided in this claim, (3) respondent is entitled to receive reasonable notice of a demand for a minimum amount of permanent partial general disability benefits and claimant failed to provide such reasonable notice until after this claim had been decided by the Board, and (4) respondent promptly paid claimant benefits for a five percent permanent partial general disability once claimant requested payment.

The only issue before the Board on this appeal is whether claimant is entitled to receive an interest penalty under K.S.A. 44-512b for the alleged lack of just cause or excuse to pay benefits for the minimum permanent partial general disability that the Judge could have found.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes that the March 7, 2003 Preliminary Decision should be affirmed.

The Workers Compensation Act provides that an injured worker is entitled to receive an interest penalty when an employer or its insurance carrier without just cause or excuse fails, before an award, to pay compensation. K.S.A. 44-512b provides:

(a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

(b) Interest assessed pursuant to this section shall be considered a penalty and shall not be considered a loss or a loss adjustment expense by an insurance carrier in the promulgation of rates for workers compensation insurance.

(c) This section shall be part of and supplemental to the workers compensation act.

The Board concludes that under these facts claimant's request for a pre-award interest penalty should be denied. Claimant did not make an appropriate request or demand for payment upon respondent for the minimum permanent partial general disability that could be awarded in this claim until December 18, 2002, which was after the Board had decided the appeal. On January 15, 2003, respondent forwarded a check to claimant's attorney as compensation for a five percent permanent partial general disability.

The Board notes that in claimant's attorney's January 7, 2000 letter to respondent that he demanded payment of the permanent partial disability compensation that was then due and owing. The Board concludes, however, that the January 7, 2000 demand was deficient and does not support an award of an interest penalty. The demand read:

Demand is also made that any permanent partial disability payments now due or owing based upon the PPD rating of the authorized treating physician be made through our office. This demand is made with regard to situations where no material issue as to compensability in a case exists and is also made pursuant to statute K.S.A. 44-510(d) *[sic]* and K.S.A. 44-523 in addition to K.S.A. 44-512(b) *[sic]*, K.S.A. 44-535 and K.A.R. #51-3-17.

First, the January 7, 2000 demand referred to permanent partial disability benefits that were then due and owing as determined by an authorized treating physician's rating. But claimant's present request for pre-award interest is based upon the functional impairment ratings from Dr. Prostic, who was not the authorized treating physician.

Second, the January 7, 2000 demand did not request the payment of permanent partial general disability benefits based upon a definite functional impairment rating.

Instead, the Board reads claimant's demand as a request that payments be made to his attorney's office.

Third, the January 2000 demand references K.S.A. 44-512(b), which is a statute that pertains to the time and manner of making compensation payments. K.S.A. 44-512(b) does not pertain to the pre-award interest penalty, which is created by K.S.A. 44-512b. The demand also refers to K.A.R. 51-3-17, which is an administrative regulation that was revoked on May 22, 1998.

And fourth, claimant directed the demand to respondent's personnel manager rather than to respondent's attorney, who had not yet entered his appearance. Claimant did not repeat the request or demand for payment of permanent disability benefits until after the claim had been decided by the Judge and this Board.

The Board concludes that an employer and its insurance carrier are entitled to reasonable notice of the compensation that is being claimed. In this instance, respondent did not receive such reasonable notice until approximately December 19, 2002. Furthermore, a literal reading of K.S.A. 44-512b requires a worker to request an interest penalty at the time of regular hearing, which claimant did not do.

For the above reasons, claimant's request for a pre-award interest penalty should be denied.

AWARD

WHEREFORE, the Board affirms the March 7, 2003 Preliminary Decision entered by Judge Foerschler.

IT IS SO ORDERED.

Dated this ____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director